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JUDICIAL INDEPENDENCE: SECOND STEPS

By Penny J. White

During the past few years, the American judiciary has lost several judges to single-issue, negative political maneuverings.[1] We are analogous to the floating babies that were not rescued from the river. As a former judge who lost her seat in a retention election as a result of a single-issue attack, I share with many members of the profession the desire to rescue other judges before they too become casualties of the war currently being waged against judicial independence. But, it occurs to me that rescuing those who float toward us will simply not be enough to stop the attack on the independence of the judiciary. We must do more.

Understanding the Import of Judicial Independence

Surely, recognizing the importance of judicial independence is the first step to preserving it, just as is reaching into the stream to save potential casualties. But there are other steps we must take as well. As we contemplate these next steps, we must, in a sense of renewal and commitment, ford the river upstream and find out who is responsible for trying to destroy judicial independence. And we must stop them because plucking casualties from the river will not be enough.

Research and investigation on the issue of judicial independence establishes one thing with certainty—when we discover who is responsible for the attack on the independence of the judiciary, we will undoubtedly find a crowd. It is human nature to congregate around what is considered to be a no lose situation, and many have jumped aboard the judiciary bashing bandwagon. For example, the U.S. Chamber of Commerce recently suggested to local chambers that they use lawyer bashing as a theme for their advertisements. Their thinking? That *no one* opposes lawyer bashing, or at least, the overwhelming majority does not.

So to it is with attacks on the judiciary. It is the favorite pastime of politicians for it is seen as a winning platform, a sure way to influence votes. Beat up the judges, after all they can't fight back; beat up the judges and you will capture the voters and the election. We all recall that the impeachment of Federal District Judge Harold Baer was the single issue that both candidates in the last presidential election agreed upon, despite the fact that Judge Baer was appointed for life.[2]

Also that same election year, a booklet circulated widely on Capitol Hill, urging members of Congress to initiate impeachment proceedings against so-called "activist judges" regardless of whether there was a likelihood of success on the merits. Why? The booklet candidly answered the question:

> Even if it seems that an impeachment conviction against a certain judge is unlikely, impeachment should nonetheless be pursued. Why? Because just the process of impeachment serves as a deterrent. A judge, even if he knows that he is facing nothing more than a congressional hearing on his conduct, will usually become more restrained in order to avoid adding fuel to the fire and thus giving more evidence to the critics calling for his removal.

When Congress reconvened in 1997, the majority whip of the House announced that "a part of the conservative efforts against judicial activism will be to go after the judges."[3] Similarly, in the state houses, members have drafted articles of impeachment against state judges for rulings in individual cases with the same purpose:[4] to intimidate, and in their words, "reign in" the judiciary.[5]

These members of the executive and legislative branches suggest that they can affect judges' rulings by threatening their jobs. And the reason they suggest this is simple. Because in some cases, the intimidation tactics work. Not only have some judges played into the hands of the politicians in their rulings, but some have even modeled their judgeship campaigns after the politicians' tactics, relying on emotional sound bites to promote themselves and detract from their opponents.

For instance, while campaigning for the state supreme court, an Alabama Court of Criminal Appeals' judge labeled the court as "too left and too liberal" and challenged the court to "set executions immediately" in twenty-seven cases despite the fact that all of the cases were pending federal habeas review. [6] In another example, a California Superior Court judge, who was a former prosecutor, publicly criticized a federal court of appeals for a decision in a capital case stating that "As a former prosecutor, [I] am outraged by the decision." The judge called on Congress to remove death penalty appellate jurisdiction from all courts except the U.S. Supreme Court.

Illustration by Tim Lee

Even more egregious are the antics of a judge in Texas, also a former prosecutor, who characterized his efforts to see that a defendant was executed, as "God's work." When requested to transport some witnesses who were on death row to a hearing, he asked, "Could we arrange for the van to be blown up on the way down here?" He ceremoniously taped a picture of Judge Roy Bean's hanging saloon on the front of his bench with his name superimposed over Judge Bean's.[8] In yet another example, a candidate for the Texas Court of Criminal Appeals promised greater use of the death penalty, greater use of the harmless error doctrine, and sanctions against attorneys who file frivolous appeals especially in death penalty cases. [9]

These judges were never thrown from the shore by politicians seeking to undermine the third branch, rather these judges voluntarily jumped aboard the job security lifeboat. They are, ironically, judges who do injustice to the justice system.

If members of the executive and legislative branches make outrageous claims against state and federal

Politics Over Independence: One Judge's Experience

It was six weeks to the day before my retention election—June 14, 1996. I was the newest member of the five-member Tennessee Supreme Court, having been appointed in December of 1994 to complete the unexpired term of a retiring justice. As an appointed justice, I was required to stand for retention in the following August 1996 election. Six weeks prior to the election, I was with all of the judges of the courts of record in Tennessee, at our annual judicial conference when we received the word, "They've started a 'just say no' campaign against Justice White."

Because in the more than 20 years that Tennessee's version of the Missouri Plan had been in place, no judge had ever faced a challenge or an attack in a retention race, I was utterly unprepared. I'd talked with political consultants several months earlier; conversed with the other justices; and, in fact, run a successful retention race just two years earlier while serving on the intermediate appellate court. Everyone agreed that in keeping with the Tennessee tradition, I should just do my job.

And so that is what I did. I was current in my caseload; presented programs to every organization that asked; and served as liaison on some of the most visible committees in the profession. Following the example of predecessors and the advice of colleagues and consultants, I was working, and I had no active campaign committee, no treasurer, no funds.

As a result, when the attack began, I was surprised—surprised that there was an attack and that the attack focused on an opinion that I had not even written—an opinion released more than a month earlier, which granted a new sentencing hearing for a capital defendant, a disposition with which every judge on the appellate and supreme court agreed. The new sentencing hearing was constitutionally required because the trial judge had barred mitigating evidence in the bifurcated sentencing hearing. And I was surprised that having participated in only one death penalty decision—a decision that upheld the constitutionality of Tennessee's death penalty statute—I was suddenly characterized as being anti-death penalty.

In retrospect, given the emotional nature of the issue and the ethical restrictions that I faced, a campaign war chest or committee probably would not have made a difference. In the six weeks between the initial attack and the retention election, a scofflaw organization called the Tennessee Conservative Union (TCU) (the "they" in the original attack), mounted a vigorous, misleading campaign to unseat me, which was ultimately successful.

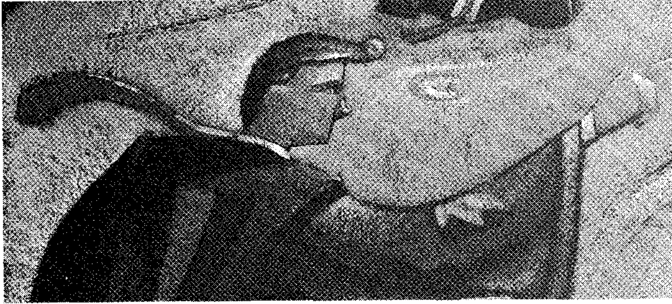
The TCU did not accomplish the deed alone, though. In fact, in hindsight they were probably just the conduit of a much more organized and concerted political effort. Although Tennessee law prohibits judges in retention races from running partisan races, the Republican party waged an all-out campaign against me. The current governor and both U.S. senators from the state voted early, called press conferences, and announced their vote against me urging others to do the same. The party mailed out flyers across the state that proclaimed: "If you are for capital punishment, vote against Penny White." In Tennessee, where no execution has occurred in more than 35 years and where the public overwhelmingly favors the death penalty, it was a winning message.

During the entire attack, the remanded death penalty case that ostensibly triggered the attack, remained pending. Despite the state's ability to seek and secure another death sentence, my opponents and the press frequently reported that I had "freed the murderer." The efforts of supporters—retired judges and lawyers—to correct this mischaracterization was largely ignored by the media. The true story was not as enticing as the one the opposition had created. What the public wanted to hear—my proclamation that I supported capital punishment—is what all judges, at least those who choose to follow the ethical obligations of the Model Code of Judicial Conduct (the Code), are prohibited from saying. I chose to follow the Code and remained silent.

After an election with an extremely low voter turnout, those opposing me were successful. I was defeated by a 10 percent margin with less than 19 percent of the eligible voters exercising their right to vote—a commentary on how easy it is to oust a judge when the overwhelming majority does not vote. Those who embraced the demagogic message went to the polls; those, like many of my colleagues who believed that "this too shall pass," stayed home.

In celebration of their victory, the governor promised the citizens that he would only appoint judges who promised to support capital punishment. His announcement that he "hoped" that other judges would "look over [their] shoulders" before deciding how to rule, showed an absolute disregard for the essential requirement of the judiciary—independence.

Looking back, of course I regret that I am no longer in a position to serve on the court, but I have never lamented my decision to decline comment on the case or to take a position other than one to uphold the law and apply the law to the facts of every case. My greatest regret is that those who would improperly influence the judicial process can boast of a triumph of politics over judicial independence.



Judges and those who support judicial independence must educate citizens about judicial independence.

judges, to whip them into shape—and if that schoolyard bully mentality actually works on some who wear the robe, what should judges do? How are these antics to be stopped?

The answer is simple. Judges should refuse to cower and instead stand firm in their resolve to act independently despite threats. Once judges make it clear that threats and intimidation will not affect their decisions, the tactics are likely to cease.

All independent judges should shudder when they see a judge succumb to the pressure either by campaigning unethically or making inappropriate comments. Particularly because all judges are in fact, judged by the acts of those few. We should counsel those colleagues who fall victim to the intimidation, but if counsel yields no change, we must be willing to seek sanction against improper and unethical judicial behavior. [10] So long as intimidation is seen as working, it will remain a viable tactic. Its viability will be nullified by judges who refuse to succumb to intimidation and by judges who take a stance against those who do.

The Power of the Press

Unfortunately, the politicians and the judges who jump on board job security lifeboats are not the only ones laying in wait upstream. Journalists are also waiting there with highly critical headlines such as *The Wall Street Journal*'s "America's Worst Judges," Ann Landers' "Another Judge's Unbelievable Ruling," and *The National Enquirer*'s "Public Enemy Number 1." Consider these titles and subheadings from a recent book entitled *Out of Order*, written by the editorial features editor of *The Wall Street Journal*: "The Injudicious Judiciary;" "A Good Judge is Hard to Find;" "Gavelitis: the Disease of the Bench;" "What a state judge can get away with;" " Federal judges, Unaccountable for Life;" "Juristocracy I: The Unelected Legislature;" " Juristocracy II: Government by Decree;" "The Civil Injustice System;" "Justice for Rent;" "Judges Who are Ethically Challenged;" and "Dethroning the Judiciary." [11] What is more alarming than the book's chapter titles and its author is the foreword and its author. The foreword praises the book's subtitle: *Arrogance, Corruption, and Incompetence on the Bench* and begins like this: *Arrogance, Corruption, and Incompetence on the Bench* sums up a judicial system that is not working well. All too often it is not performing tolerably." [12] From that beginning, the foreword continues: "much of what has gone wrong with the American courts occurs everywhere there is an independent judiciary." [13] The author of those words—Judge Robert Bork.

How do you stop unfair journalism? Perhaps journalists would be more fair if judges helped them to be. Many judges attribute their good media relations to the working relationships they have with the media. Judges should talk to journalists when they can within ethical constraints, and explain to them the ethical restrictions when they cannot. In addition, journalists who consistently inform the public about the importance of an independent judiciary should be encouraged to begin a dialogue between journalists and jurists regarding the dual responsibility of preserving this country's promise of equal justice under the law.

The Citizenry

Of course, there will be citizens waiting alongside the others at the river's head . Many judges receive periodic mailings from so-called citizen's watch groups, all not-so-subtle attempts to encourage judges to think as they do and to rule accordingly. [14] Like the politicians' threats, these threats cannot be allowed to accomplish their purpose.

Additionally, judges and those who support judicial independence must educate citizens about judicial independence. I am convinced that if citizens are made to understand that judicial independence means a judiciary uncontrolled by the government, they would support it. And if citizens realized that a country without judicial independence is a country without freedom, they would fight and die for it. After all, their forefathers did. Thus, judges and those who support judicial independence must educate the public about this principle at every opportunity. The average citizen must be made aware of how judicial independence affects his or her life.

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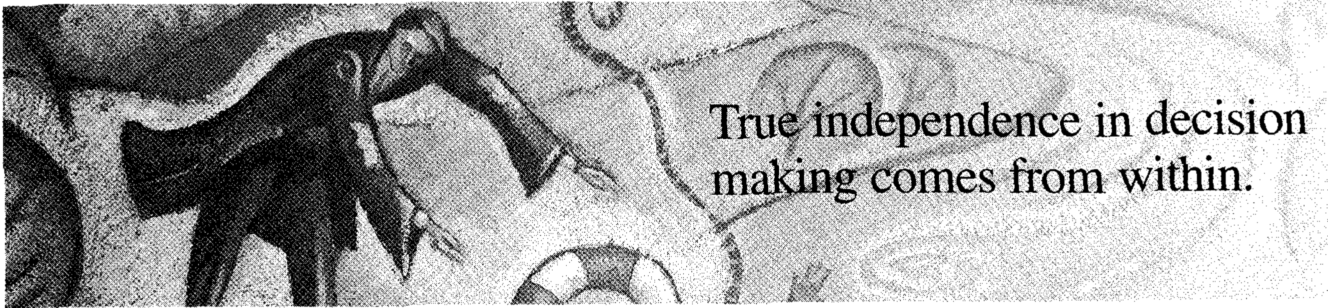

Conclusion

A visiting Russian judge attending a course at the National Judicial College summed up the essence of judicial independence when he struggled to explain, in broken English, why he was so overcome by our justice system. He praised many of its virtues, but wasn't satisfied that he had really captured what made it so admirable to him. He finally summarized it this way: "American judges have the right to be free in their hearts."

"Judicial independence is a matter of the character of the individual judge." [15] A witness before the ABA Commission on the Separation of Powers and Judicial Independence echoed that sentiment when he said, "it is the character and integrity of the judge that instills confidence in the people" and that will foster their commitment to preserving judicial independence.[16]

It is not the Code of Judicial Conduct, [17] the Declaration of Independence, [18] or the judge's oath of office [19] that makes a judge independent. Certainly, all of these provide for independence, in fact demand it, but true independence in decision making comes from within. It comes from the judge's character; and it comes because of who the judge is.

In *Civilization and its Discontents*, Sigmund Freud struggled to define civilization. He spoke of technology, aesthetics, cleanliness, and order, but the decisive step in civilization, Freud concluded, was the replacement of the brute force in the community.[20] He concluded that the first requirement of civilization was, therefore, justice.[21] Freud defined justice as law administered impartially without favor to any interest or any individual.[22]

And so it is with attacks on the independence of the judiciary. It takes nothing more than brute force to throw independent judges in the river; it is, at best uncivilized. But to stop those who would so threaten justice, judges must stand together and take the next giant step toward preserving judicial independence. To assure that justice is the defining quality of our civilization remains the ultimate task for every judge in America.

Notes

1. Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election*, 75 Boston U. L. Rev. 759, 760-66 (1995).
2. Jon O. Newman, *The Judge Baer Controversy*, 80 Judicature 156 (Jan.-Feb. 1997).
3. *See* Representative Tom DeLay, Letter to the Editor, *Impeachment Is a Valid Answer to the Judiciary Run Amok*, N.Y. Times, Apr. 6, 1977, section 4, at 18.
4. *See* Woody Baird, *Impeach Judge Nixon, Rally Demands*, Com. Appeal (Memphis, Tenn.), Jan. 20, 1997, at B1, available in 1997 WL 7339509; Alisa LaPolt, *Senator Seeks to Bounce Judge "Opposed to Death Sentence,"* Nashville Banner, Feb. 10, 1997, at A1, available at 1997 WL 7332863.
5. *See* Edwin Meese III & Rhert DeHart, *Reigning in the Federal Judiciary*, 80 Judicature 178 (Jan.-Feb. 1997).
6. Tom Hughes, *Montiel Challenges Court to Schedule Executions*, Montgomery Advertiser (Ala.), May 19, 1994, at 3B.
7. Matthew Heffer, *Judge Criticizes 9th Circuit for Death Penalty Decision*, L.A. Daily J., July 31, 1995, at 1, 30.
8. Brent E. Newton, *A Case Study in Systematic Unfairness: The Texas Death Penalty*, 1973-74, Tex. F. Civ. Lib. & Civ. Rts., Spring 1994, at 1, 24.
9. Janet Elliott & Richard Connelly, *Mansfield, The Stealth Candidate: His Past Isn't What It Seems*, Tex. Law., Oct. 3, 1994, at 1.
10. *The Model Code of Judicial Conduct* requires in its Preamble and in Canon 1 that judges uphold the independence of the judiciary. ABA Model Code of Judicial Conduct, Preamble & Canon 1.
11. Max Boot, Out of Order (1998).
12. *Id.* at v.
13. *Id.*
14. *See generally* Tom Humphrey, *White Ouster Signals New Political Era: Judges May Feel "Chilling Effect,"* Knoxville News-Sentinel, Aug. 4, 1996, at A1 (reporting that Tennessee Conservative Union would research records of other justices to determine who to target in next election).
15. American Bar Association, Report of the Commission on the Separation of Powers and Judicial Independence, at 8 (July 4, 1997).
16. *Id.*
17. Model Code of Judicial Conduct Canons 1, 2, & 5.
18. The Declaration of Independence, para. 7 (U.S. 1776).
19. Many judicial oaths require that judges rule without "fear or favor." *The Model Code*, in its commentary to Canon 1, states that "[t]he integrity and independence of the judges depends in turn upon their acting without fear or favor." Model Code of Judicial Conduct Canon 1, Commentary [1].
20. Sigmund Freud, Civilization and Its Discontents (1930).
21. *Id.*
22. *Id.*

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